No. 76-1480

Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

BENJAMIN RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 545 F. 2d 829.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1976, and a petition for rehearing was denied on March 25, 1977. The petition for a writ of certiorari was filed on April 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's modified "Allen" charge to the jury improperly coerced a verdict of guilty.

2. Whether the trial court erred when, upon being advised by the jury that it was unable to reach a verdict, the

court instructed the jury to continue deliberations without notifying counsel of this episode until about two hours later.

3. Whether the prosecutor's summation improperly implied that petitioner failed to testify.

4. Whether the trial court's instruction to the jury in this tax evasion case that it was not required to find that the unreported income arose from the purchase and sale of heroin constituted an improper amendment of the indictment.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of willfully attempting to evade his income tax for 1967, in violation of 26 U.S.C. 7201, and of willfully filing a false income tax return for the same year, in violation of 26 U.S.C. 7206(1). The trial court sentenced him to two years in prison on the tax evasion charge but imposed no sentence for the false return count because it concluded that the false return charge was a lesser included offense (Pet. 5). The court of appeals affirmed (Pet. App. 1a-6a)

The government's case was based upon the expenditures method of proof. The evidence showed that petitioner's assets were quite limited at the beginning of 1967 but that during that year he spent more than $66,000, which was neither attributable to reported income nor to nontaxable sources of funds (Tr. 460-477, 513-573, 1242-1294; Govt. Exs. 1, 64, 65, 65A, 65B, 81, 192, 193).[1] The government introduced further evidence that showed that in the three-month period preceding November 1967, petitioner had received large profits by acting as a middleman in the sale of 58 kilograms of heroin, which had been smuggled into the United States (Tr. 918-939, 940-963, 1159-1188).

The defense introduced evidence that by the end of 1966 petitioner was a man of substantial means as a result of his sale of certain properties in Puerto Rico late in 1965. The government contended that petitioner had not kept any of the funds from those realty transactions because he had sold the properties as an agent for third parties. Proof that petitioner's real estate activities were on behalf of third parties was brought out on cross-examination of defense witnesses (Tr. 1381-1419, 1422-1470, 1507-1557, 1585-1613, 1652-1661, 1804-1860) and in the government's rebuttal case. The evidence showed that many of the defense witnesses had made prior inconsistent statements in which they named third parties as the real parties in interest in the real estate transactions, and that petitioner himself had once told an FBI agent that he was in Puerto Rico to make investments in real estate on behalf of a person known as Marquez (Tr. 1907-1908).

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[1] "Tr." refers to the trial transcript.

The jury retired to deliberate at about noon on March 1, 1976 (Tr. 2144). In the afternoon of that day, the members of the jury sent the court a note stating that they could not reach a unanimous verdict, and the court asked them to continue their deliberations (Tr. 2162-2163). At about 6 p.m., the jury sent a note saying that one juror felt the "atmosphere in the entire court was hostile at all times to the defendant's cause of action" and that the jury felt they could not reach a unanimous verdict because that juror believed "a fair trial ha[d] not taken place" (Tr. 2164; Court Ex. 7). The court excused the jury for the night, and stated that he would answer their note the following morning (Tr. 2164-2165). The next morning the court gave the jury a lengthy supplemental charge. In substance, he told them that they were to decide the factual issues raised in the case while he was to rule on the law and that it was his duty, not theirs, to insure that there was an atmosphere in the courtroom where there could be a rational and fair trial (Pet. App. 7a-10a; Tr. 2169-2174). He then proceeded to give a modified "Allen charge" (Pet. App. 10a-13a; Tr. 2174-2178).[2] At about 3:45

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[2]The court instructed the jury, *inter alia*, as follows (Pet. App. 11a-13a):

> Your final vote must reflect your conscientious decision as to how the issues are to be decided. But that conscientious decision must be based upon the evidence in this courtroom and upon the law as I stated it to you. If you follow that process and apply it, then obviously you are not to yield your convictions simply because you happen to be outnumbered and outweighed.
>
> This trial, as I told you yesterday, took some 12 days. It was spread out over a period of four weeks. The fact issues have been sharply delineated. The trial has been expensive, and if you should fail to agree on a verdict, the case is left open and undecided, and like all cases it must be disposed of at some time, and there appears to be absolutely no reason to believe that another trial would not be equally expensive, nor does there appear to be any reason to believe that the case can be tried again more expertly or more exhaustively or more earnestly than it has been on either side.
>
> Any future jury must be selected in the same manner as you were and must be chosen from the source that you were chosen from, so there doesn't appear to be any reason to believe that the case would ever be submitted to 12 jurors who are more intelligent, more impartial or more competent to decide this case or that more or clearer evidence could be produced on behalf of either side.
>
> * * * * *
>
> Now, while undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.
>
> The very object and purpose of the jury system is to secure unanimity by comparison of views and by argument among the jurors themselves.
>
> * * * * *
>
> Now listen to what the Supreme Court of the United States has said on this and I am now quoting:
>
> "Although the verdict must be the verdict of each individual juror, they should listen with a disposition to be convinced by each other's argument, that if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of some men equally honest, equally intelligent as himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judgment which was not concurred in by the majority.
>
> "Now, it cannot be that each juror should go into the jury room with a blind determination that the verdict shall represent his or her opinion of the case at the particular time or that he should close his ears to the argument of men and

p.m. on the second day of deliberations, the jury sent a note to the judge, who was then in the midst of a preliminary injunction hearing (Tr. 2186), saying they were deadlocked

11 to 1 for conviction, with the lone juror believing that the evidence was insufficient for a verdict of guilty and that the trial was "conducted in an atmosphere detrimental to the defendant's cause of action" (Tr. 2192-2193; Court Ex. 11). Without consulting counsel, the court sent word to the jury to continue its deliberations and continued with the preliminary injunction hearing (Tr. 2192-2193). Approximately two hours later, the jury sent another note, this time asking for the testimony of a witness to be read (Tr. 2190; Court Ex. 12). At this juncture, the court advised counsel of the jury's most recent request and of the note to which he had already responded (Tr. 2190-2193). Counsel did not object to the court's response to the earlier note or to the furnishing of the transcript of the witness's testimony. Following the reading of the requested testimony, the jury again retired. At 7:00 p.m. on the same day it returned with its guilty verdict (Tr. 2194-2195).

ARGUMENT

1. Petitioner argues (Pet. 9-16) that the trial court's supplemental charge (Pet. App. 7a-13a) coerced the jury to render a guilty verdict and thereby constituted reversible error. In petitioner's view (Pet. 10-11), the charge placed "great coercive pressure" upon the "holdout" juror; the court improperly took "a lawyer's view of what a 'hostile'

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women who are equally honest and intelligent as himself or herself and who bear the same responsibility, serve under the same sanction of the same oath and heard the same evidence with, we may assume, the same attention and with an equal desire to arrive at a fair and honest determination."

Now remember that at all times no juror is expected to yield a conscientious conviction that she or he may have as to the weight or effect of the evidence, but remember also that after full deliberation and a consideration of all the evidence it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience.

courtroom and a 'fair trial' portend"; and the court undermined the jury by advising it that the appeals court would correct any errors of law.

After reviewing the entire supplemental charge (Pet. App. 7a-13a), the court of appeals correctly found that there was "nothing * * * which exceeds the permissible encouragement of the jurors to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial. The jury was neither coerced nor directed toward any verdict" (Pet. App. 5a). The instruction was well within the bounds of previously approved supplemental charges.[3] Although three courts of appeals have determined, in the exercise of their supervisory power, that the "Allen" instruction upon which the supplemental charge in question is based (see *Allen* v. *United States*, 164 U.S. 492) should be abandoned in favor of a modified form of the charge,[4] no court of appeals has held that the traditional "Allen" instruction is so coercive that any conviction following such a charge must be reversed; nor has

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[3] *United States* v. *Flannery*, 451 F. 2d 880, 883-884 (C.A. 1); *United States* v. *Kenner*, 354 F. 2d 780, 782-784 (C.A. 2), certiorari denied, 383 U.S. 958; *United States* v. *Alper*, 449 F. 2d 1223, 1233-1234 (C.A. 3), certiorari denied *sub nom. Greenberg* v. *United States*, 405 U.S. 988; *United States* v. *Rogers*, 289 F. 2d 433, 434-437 (C.A. 4); *United States* v. *Bailey*, 480 F. 2d 518 (C.A. 5) (*en banc*); *United States* v. *Harris*, 391 F. 2d 348, 350-357 (C.A. 6), certiorari denied, 393 U.S. 874; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Pope*, 415 F. 2d 685, 690-691 (C.A. 8), certiorari denied, 397 U.S. 950; *Walsh* v. *United States*, 371 F. 2d 135 (C.A. 9), certiorari denied, 388 U.S. 915; *Elbel* v. *United States*, 364 F. 2d 127, 134-136 (C.A. 10), certiorari denied, 385 U.S. 1014; *United States* v. *Thomas*, 449 F. 2d 1177 (C.A. D.C.) (*en banc*.).

[4] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Thomas*, 449 F. 2d 1177 (C.A. D.C.).

any court of appeals held that the charge is unconstitutional. While the development and use of the "Allen" charge is being reexamined by some of the circuits, there is no conflict of statutory or constitutional interpretation and no necessity for further review by this Court. See *United States* v. *Fonseca*, 497 F. 2d 1384 (C.A. 5), certiorari denied, 419 U.S. 1072; *United States* v. *Lee*, 506 F. 2d 111 (C.A. D.C.), certiorari denied, 421 U.S. 1002.

2. Petitioner further contends (Pet. 16-19) that the trial court erred when, in response to a note sent by the jury that it was deadlocked, he sent instructions to the jury to continue deliberations, without notifying counsel of the jury's note and his response until about two hours later. But once having learned of the episode, petitioner did not object to the court's disposition of the jury's note. As the court of appeals pointed out, "any objection to the continuation of jury deliberations could have been taken effectively at that time" (Pet. App. 3a-4a). Hence, in the absence of plain error, there is no basis for reversal of the conviction.

The court of appeals correctly held that the trial court's response to the note without informing counsel was not plain error because it produced no "reasonable possibility of prejudice." *United States* v. *Reynolds*, 489 F. 2d 4, 8 (C.A. 6), certiorari denied, 416 U.S. 988. Rule 43 of the Federal Rules of Criminal Procedure guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial"; it therefore would have been preferable for the trial court to have advised counsel of the jury's note and his proposed disposition. See, *e.g.*, *United States* v. *Schor*, 418 F. 2d 26, 29-30 (C.A. 2); *United States* v. *Glick*, 463 F. 2d 491, 493 (C.A. 2). But the trial court's note to the jury provided no "reasonable possibility of prejudice" to petitioner although it was sent without prior notice to counsel. As the court of appeals pointed out (Pet. App. 3a, 4a), the jury's intervening request for the testimony of a key witness showed that the jury was deliberating in a responsive and conscientious fashion.

Finally, the jury did not request and the trial court did not give legal instructions in the absence of petitioner and counsel, nor did the court comment on the acceptability of a particular verdict. Accordingly, this case is distinguishable from *Rogers* v. *United States*, 422 U.S. 35, upon which petitioner relies (Pet. 18). In *Rogers*, the trial court, without notifying the defendant or his counsel, responded affirmatively (and erroneously) to a jury inquiry as to whether it would accept a verdict of guilty as charged with extreme mercy of the court. In those circumstances, "the communication from the jury * * * was tantamount to a request for further instructions" (422 U.S. at 39) and the trial court delivered substantive instructions that should have been rendered in open court. Here, on the other hand, the trial court simply directed the jury to proceed with its deliberations, without indicating that a special form of verdict would be acceptable or otherwise delivering substantive instructions.[5]

3. Petitioner also contends (Pet. 19-21) that the prosecutor committed reversible error in commenting on the petitioner's failure to testify. As petitioner points out (Pet. 20), the test for determining whether a statement by a prosecutor was an improper comment in this respect is whether the language used was "manifestly intended or was of such a character that the jury would naturally and

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[5]In *Shields* v. *United States*, 273 U.S. 583, upon which petitioner also relies (Pet. 17-18), the trial court sent a written communication to a deadlocked jury that it had to find the defendant guilty or not guilty. The district court here did not, however, demand that the jury reach a verdict.

necessarily take it to be a comment on the failure of the accused to testify." *United States* v. *Williams*, 503 F. 2d 480, 485 (C.A. 8); *Haberstroh* v. *Montanye*, 493 F. 2d 483 (C.A. 2). Under this test, the prosecutor's remarks cannot be construed as intending to comment on petitioner's failure to take the witness stand.[6] *Griffin* v. *California*, 380 U.S. 609, and *Wilson* v. *United States*, 149 U.S. 60, upon which petitioner relies (Pet. 19-20), are not controlling, for in those cases, unlike this one, the prosecutors made direct references to the defendants' failure to testify.

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[6]The first comment referred to by petitioner arose in the course of the prosecutor's discussion of the evidence relating to petitioner's dealings in heroin, in which he pointed out that that testimony was "not controverted in any significant fashion" (Tr. 2008). But this comment did not "naturally and necessarily" direct the jury's attention to petitioner's failure to testify. It was open to petitioner to attempt to controvert the evidence without taking the stand, for example by introducing evidence that the prosecution witness had made prior inconsistent statements, proving that details of his testimony that could be challenged by others were not true, and establishing that he had previously testified falsely, making him unworthy of belief. The prosecutor was entitled to call attention to the strength of the testimony and the fact that it was not controverted.

The second instance was a comment by the prosecutor on the defense contention that by the end of 1966, petitioner had large amounts of undeposited cash. The prosecutor asked rhetorically: "Where was this money, hidden under a rug? A mattress? In a sock? Where were the rugs, the mattresses and the socks in this case?" (Tr. 2080). However, this argument was entirely proper in the context of the facts of the case. Petitioner called eight witnesses in an effort to show that by the end of 1966, he was a man of means. But the defense never introduced any proof, which, if it existed, should have been available at least in part from third party witnesses, that he had substantial assets at the end of 1966. The prosecutor's comment did no more than rebut the arguments of defense counsel and correctly call the jury's attention to this weakness in petitioner's case. Cf. *United States* v. *Dioguardi*, 492 F. 2d 70, 82 (C.A. 2), certiorari denied, 419 U.S. 873; *United States* v. *Noah*, 475 F. 2d 688, 695-696 (C.A. 9), certiorari denied, 414 U.S. 1095. It was not of such a character as would necessarily be taken by the jury as a comment on petitioner's failure to testify. See *United States ex rel. Leak* v. *Follette*, 418 F. 2d 1266, 1269 (C.A. 2), certiorari denied, 397 U.S. 1050.

4. Petitioner further argues (Pet. 25-29) that the trial court permitted an improper amendment of the indictment. This argument is based on the court's charge to the jury (Tr. 2159-2160) that it was unnecessary for the government to prove that the excess expenditures came from the sale of heroin, and that if the jury was convinced beyond a reasonable doubt that the government had negatived all plausible sources of nontaxable funds it need not find that the unreported income arose from any particular source. The trial court's instruction was a correct statement of the law. *United States* v. *Massei*, 355 U.S. 595. The language of the indictment to the effect that the unreported income arose "from the purchase and sale of heroin" was surplusage. An indictment is sufficient if it charges a crime in the language of the statute, leaving further details of the charge to be furnished in a bill of particulars. *United States* v. *Lepowitch*, 318 U.S. 702, 704; *Ekberg* v. *United States*, 167 F. 2d 380, 387 (C.A. 1). Hence, omission of an allegation as to the source of the excess funds would not affect the validity of the indictment under 26 U.S.C. 7201. *Heasley* v. *United States*, 218 F. 2d 86, 88-89 (C.A. 8), certiorari denied, 350 U.S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C.A. 7).

Of course a "court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217. However, factual averments in an indictment going beyond the essential elements of the crime charged may be eliminated without working an impermissible amendment of the indictment. *United States* v. *Archer*, 455 F. 2d 193, 194 (C.A. 10), certiorari denied, 409 U.S. 856; *United States* v. *Cirami*, 510 F. 2d 69, 72-73 (C.A. 2), certiorari denied, 421 U.S. 964. Here, the essential elements of the crime with which petitioner was charged was that he realized substantial unreported income, that he made an affirmative

attempt to evade the tax on that income, and that he did so willfully. *Sansone* v. *United States,* 380 U.S. 343, 351. The government was not required to prove the specific source of the income, and the trial court correctly advised the jury of that fact. *United States* v. *Massei, supra*; *United States* v. *Calles,* 482 F. 2d 1155, 1159 (C.A. 5). Moreover, petitioner was neither prejudiced by any change in the government's proof nor surprised by the evidence adduced against him. Consonant with the indictment, the government insisted throughout the trial that petitioner's income had indeed come from heroin transactions, and there was direct evidence to prove it (Tr. 918-939, 940-963, 1159-1188).

Contrary to petitioner's argument (Pet. 27-28), *Stirone* v. *United States,* 361 U.S. 212, is distinguishable. There, the indictment charged the defendant with interfering with interstate commerce in the importation of sand into Pennsylvania, but under the court's instructions he may have been convicted of such interference in the exportation of steel from the state. The conviction could not stand since it might have been on a charge entirely different from that contained in the indictment.[7]

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[7]Petitioner also claims (Pet. 21-25) that he was prejudiced because the prosecutor unfairly called attention to a witness's prior invocation of the attorney-client privilege, improperly called Marquez a numbers operator, and elicited from a witness that he was assigned to the organized crime strike force. The attorney-client privilege, however, was simply mentioned by the prosecutor in passing when another related part of the prior sworn testimony of the witness was being read to impeach him (Tr. 1533-1535). The reference to Marquez as a numbers operator (Tr. 1832-1833) was made in anticipation of the later use of petitioner's own statement in which he so referred to Marquez (Tr. 1097-7 to 1097-8). Finally, the fact of the assignment of a government witness to the strike force was brought out when certain background material was elicited from him, and any potential error in that respect was cured by a prompt instruction from the court (Tr. 1243-1248).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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